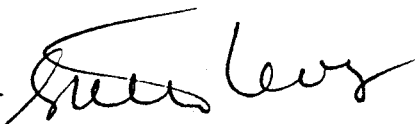


Memorandum

To : Mr. D. Scott Abel
Environmental Fees Division (MIC: 57)

Date: January 20, 1994

From : Stella Levy
Staff Counsel



Subject: UST: Federal Credit Unions

I am writing in response to your September 16, 1993 memorandum to Janet Vining requesting a legal opinion regarding the application of the Underground Storage Tank (UST) Maintenance Fee to Federal Credit Unions. You attached a copy of a zero return and exemption certificate from Credit Union.

Conclusion

For the reasons discussed herein, Federal Credit Unions are instrumentalities of the U.S. Government and are not liable for payment of the UST fee.

Applicable Law

The relevant sections of the Health and Safety Code are contained in Chapters 6.7 and 6.75 each of which has its own definitions.

Health & Safety Code Section 25284(a) is in Chapter 6.7 and provides that "no person shall own or operate an underground storage tank unless a permit for its operation has been issued by the local agency to the owner." Section 25281(j) defines "person" as including "any city, county, district, the state, any department or agency thereof, or the United States to the extent authorized by federal law."^{1/}

^{1/} Subsection (h) of Section 25281 defines "operator" in terms of "person". However, subsection (i) defines "owner" in terms of "owner". This is a problem because it does not relate back to "person" and also because it is redundant to define an "owner" as an "owner." I recommend that we include in next year's legislative changes a new definition of owner, e.g. "Owner"

(continued...)

Mr. D. Scott Abel
January 20, 1994
Page -2-

Thus, federal, state and local governments owning UST's are required to obtain a permit at each UST location.

Chapter 6.75 defines who pays the fees, as opposed to who must be permitized.^{2/} The definition of "owner" for purposes of paying the fee includes local government, but does not include the state or federal government. Health & Safety Code Sections 25299.21 and 25299.41. Thus, local governments owning UST's must pay the UST fee, but state and federal governments are exempt.

Federal Credit Unions were established under the Federal Credit Union Act, 14 U.S. Code Sections 1751 and following. They are defined as cooperative associations whose purpose is to promote thrift among members and a source of credit for "provident or productive purposes."

Analysis

Your memo made reference to the "fee versus tax" issue which is usually the key to deciding the application of an assessment to the federal government. In this case however, the law specifically exempts the federal government from liability for payment of the UST fee even though it must register the tanks it owns. Thus, if Federal Credit Unions are federal instrumentalities, they would not be required to pay the UST fee irrespective of whether it was technically a fee or a tax.

A federal case has held that Federal Credit Unions are federal instrumentalities and thus immune from state taxation under the Supremacy Clause of the U.S. Constitution. United States v. Michigan 851 F.2d 803 (6th C 1988). They are also exempt from the UST fee under the statutory exemption. This contradicts the information contained in the chart prepared by Janet Vining entitled Fee Application to Various Organizations. I have discussed this with Janet, and she agrees that Federal Credit Unions are exempt from the UST fee. With respect to

^{1/}(...continued)

means any person having title to or owning an underground storage tank.

^{2/}Revenue & Taxation Code Sections 50101 and following contain the UST Fee Law. Section 50107 defines "fee payer" as "any person liable for the payment of a fee imposed by Section 25299.41 of the Health and Safety Code."

Mr. D. Scott Abel
January 20, 1994
Page -3-

other fees and taxes, their application to Federal Credit Unions would depend on the "tax versus fee" distinction since Federal Credit Unions are exempt from sales and other taxes.

SCL:es

cc: Mr. Bob Frank (MIC:57)
Mr. Ed King (MIC:30)
Mr. Allan Stuckey (MIC:30)
Mr. David McKillip (MIC:57)
Mr. Larry Augusta
Ms. Janet Vining

Mr. Doug Wilson
State Water Resources Control Board
Division of Clean Water Programs
2014 T Street, Suite 130
Sacramento, CA 95816